Filed 7/26/19 In re M.T. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re M.T., a Person Coming Under the Juvenile Court Law.	B291294 (Los Angeles County Super. Ct. No. YJ39321)
THE PEOPLE, Plaintiff and Respondent, v. M.T., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, J. Christopher Smith, Judge. Affirmed.

Torres & Torres and Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

M.T. appeals from an order of wardship pursuant to Welfare and Institutions Code section 602 following the juvenile court's finding that he committed the offense of assault with a deadly weapon, in violation of Penal Code section 245, subdivision (a)(1).[1] Appellant contends that the evidence is insufficient to sustain the court's true finding. We affirm.

BACKGROUND

Factual Background

People's Evidence

Appellant lived with his father in a home in Los Angeles. Michael Nochez and his brother rented one of the bedrooms from appellant's father.

On March 22, 2018, Nochez awoke to loud music. Nochez saw appellant sitting in a chair in the living room and told him to turn down the music. Appellant responded that he did not want to turn it down and told Nochez he did not have a say in the matter. Nochez cursed at appellant, called him an "asshole" in Spanish, and returned to his room. Nochez and appellant had never previously exchanged angry words nor had any physical confrontations.

Nochez picked up his backpack to prepare to leave the house and returned to the living room. As Nochez walked toward the front door, appellant rose from his chair and stopped him. They exchanged angry words, and appellant shoved Nochez in the shoulder with both hands. Nochez removed his backpack to fight with appellant.

As Nochez moved forward to hit appellant, he noticed a knife in appellant's hand. Nochez and appellant were standing about a foot and a half apart. Nochez testified that appellant did not stab him, even though

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[1] Unspecified statutory references will be to the Penal Code.

appellant was standing close enough to do so. Instead, appellant swung the knife upwards, and Nochez backed up to avoid the knife. Nochez believed appellant was not holding the knife "in an attack stance" or in a threatening manner, but instead in a manner to warn Nochez that he had the knife. Appellant did not swing or point the knife at Nochez again. Nochez did not know appellant well, but he believed that appellant only wanted Nochez to know he had a knife because he was afraid of Nochez.

Nochez returned to his room and called 911. He remained in his room until police officers arrived. When the officers arrived, he walked into the living room, where he saw appellant sitting in a chair. Nochez spoke to an officer while appellant spoke to another officer. Nochez heard appellant tell the officer that he was underage and was afraid of Nochez because Nochez was an adult. Nochez testified that if he had known appellant was a juvenile, he would have called appellant's father about the incident.

Defense Evidence

Appellant and Robert Acosta, a defense investigator, testified on appellant's behalf. Acosta testified that Nochez called him to state that the incident was a "misunderstanding." Nochez said he would not have considered fighting appellant had he known appellant was a minor. Nochez told Acosta appellant "brandished a knife" but did not attempt to stab him, even though they were close enough for appellant to do so.

Appellant testified that he was sitting in a chair in the living room when Nochez entered and told him to turn down the volume on the radio. Nochez was yelling and angry and calling appellant names. Appellant told Nochez he did not need to speak to him that way, and Nochez said they

should fight. Appellant did not get out of the chair because he was not wearing a shirt.

After Nochez left the living room, appellant went to his bedroom to call his father and put on a shirt. He then got a knife from the kitchen table and put it in his sleeve. Appellant believed Nochez wanted to fight him, so he got the knife to deter Nochez.

When Nochez returned to the living room, appellant confronted him. Nochez removed his backpack and prepared to fight appellant. Appellant pushed Nochez, took out the knife and showed it to Nochez, then held it down by his right thigh. Appellant did not swing the knife at Nochez or try to stab him. He thought that Nochez was coming toward him to fight, so he wanted to show Nochez the knife to prevent a fight. Nochez backed up and went to his room. Appellant called his father again. He kept the knife with him because he thought Nochez was calling more people to fight.

Rebuttal Evidence

Officers Eric Sanchez and Michael Estrada responded to the 911 call. Nochez told them appellant threatened him and attempted to stab him with a knife. Nochez made a slashing motion to demonstrate to the officers how appellant had tried to stab him. The officers handcuffed appellant, seated him in a chair, and looked for the knife.

Officer Sanchez asked appellant why he grabbed a knife, and appellant said that he feared for his life because he did not know Nochez and Nochez was much older than he was. Appellant armed himself with a knife to defend himself because he did not know "what Mr. Nochez was capable of."

Officer Estrada testified that Nochez "made an upward motion" to demonstrate how appellant tried to stab him. Officer Estrada saw a "large kitchen knife" in the chair where appellant was sitting.

Procedural Background

A petition was filed under Welfare and Institutions Code section 602, alleging that appellant committed the crimes of assault with a deadly weapon (§ 245, subd. (a)(1)) and false imprisonment by violence (§ 236). The juvenile court found the allegations of the petition true as to count 1 and declared it to be a misdemeanor. The court granted the defense motion to dismiss count 2 under Welfare and Institutions Code section 701.1. The court declared appellant a ward of the court under Welfare and Institutions Code section 602 and removed him from the care and custody of his parents. The court ordered appellant suitably placed for a maximum confinement period of 1 year 4 months. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant contends the evidence is insufficient to sustain the juvenile court's finding that he committed assault with a deadly weapon.

The standard of review of an insufficiency of the evidence claim is the same in juvenile cases as in adult criminal cases: "we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt. [Citations.]" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540 (*Matthew A.*).) "'We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence . . . and we must make all reasonable

inferences that support the finding of the juvenile court. [Citation.]' [Citations.]" (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1089.)

"""""If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."""" [Citation.] "'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" [Citation.] [¶] "'A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the [factfinder]'s verdict.'" [Citation.]" (*People v. Koback* (June 27, 2019, No. E066674) ___Cal.App.5th___ [2019 Cal.App.LEXIS 592, *8-*9] (*Koback*).)

"'As used in section 245, subdivision (a)(1), a "deadly weapon" is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury."' [Citation.] Although '[s]ome few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law' [citation], we have said a knife is not such an object [citation] . . . . 'In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.' [Citation.] Our inquiry is limited to whether substantial evidence supports the juvenile court's finding that [appellant] used the . . . knife as a deadly weapon. [Citation.]" (*In re B.M.* (2018) 6 Cal.5th 528, 532-533 (*B.M.*).)

The Supreme Court in *B.M.* "clarified the law with respect to assault with a deadly weapon when the object used is not an inherently deadly weapon and distilled three principles to be applied in such cases[.]" (*Koback*, *supra*, __Cal.App.5th__, 2019 Cal.App.LEXIS 592 at p. *11.) "First, the

object alleged to be a deadly weapon must be used in a manner that is not only 'capable of producing' but also "'*likely to produce* death or great bodily injury.'" [Citation.]" (*B.M.*, *supra*, 6 Cal.5th at p. 533.) "Second, the [*People v.*] *Aguilar* [(1997) 16 Cal.4th 1023] standard does not permit conjecture as to how the object could have been used. Rather, the determination of whether an object is a deadly weapon under section 245(a)(1) must rest on evidence of how the defendant actually 'used' the object. [Citations.]" (*Id.* at p. 534.) "Third, although it is appropriate to consider the injury that could have resulted from the way the object was used, the extent of actual injury or lack of injury is also relevant. '[A] conviction for assault with a deadly weapon does not require proof of an injury or even physical contact [citation], but limited injury or lack of injury may suggest that the nature of the object or the way it was used was not capable of producing or likely to produce death or serious harm." (*Id.* at p. 535.)

In *B.M.*, the minor used a six-inch butter knife to make several downward stabbing motions on her sister's legs, which were covered with a blanket. The sister testified that the knife hit her legs several times and that the amount of pressure she felt was five or six on a scale of one to ten. The California Supreme Court held that the evidence was insufficient to sustain the finding that the knife was used as a deadly weapon, reversing the judgment of the court of appeal. (*B.M.*, *supra*, 6 Cal.5th at p. 530.) The Supreme Court supported its conclusion with the following circumstances.

"First, the record indicates that the six-inch metal knife B.M. used was '[t]he type of knife that you would use to butter a piece of toast'; it was not sharp and had slight ridges on one edge of the blade. [Citations.]" (*B.M.*, *supra*, 6 Cal.5th at p. 536.) "Second, B.M. used the knife only on [her sister's] legs, which were covered with a blanket. There is no evidence that B.M. used

or attempted to use the knife in the area of [her] head, face, or neck, or on any exposed part of her body. [Citation.]" (*Ibid.*) "Third, the moderate pressure that B.M. applied with the knife was insufficient to pierce the blanket, much less cause serious bodily injury to [her sister]. [Citations.]" (*Id.* at pp. 536-537.)

Similarly, in *In re Brandon T.* (2011) 191 Cal.App.4th 1491, the appellate court held that the evidence was insufficient to sustain the juvenile court's finding that the minor committed assault with a deadly weapon. (*Id.* at p. 1494.) The minor, Brandon T., moved a butter knife up and down the victim's cheek in a slashing motion and tried two times to cut his face with the knife. Brandon T. then tried to cut the victim's throat with the knife, but the handle of the knife broke off. The appellate court reasoned that the knife "certainly did not produce great bodily injury . . . ." (*Id.* at p. 1497.) Nor was the knife, used in a manner "*capable* of producing death or great bodily injury." (*Ibid.*) The court reasoned that, even had Brandon T. "tried a bit harder," he could not have killed or significantly injured the victim because the knife broke. (*Ibid.*) The court acknowledged that "a pointed object aimed at the victim's neck is capable of producing death or great bodily injury." (*Ibid.*) Nonetheless, the butter knife "was not capable of use as obviously intended." (*Id.* at p. 1498.)

The only evidence of the type of knife appellant used was Officer Estrada's statement that it was a "large kitchen knife." Appellant contends that this vague description is insufficient to support the juvenile court's finding. We disagree. The description of the knife as a "large kitchen knife" is inconsistent with appellant's contention that the knife could have been a butter knife similar to that used in *B.M.*

Appellant also contends the evidence is insufficient to sustain a finding that the manner in which he wielded the knife was likely to cause death or great bodily injury. "The use of an object in a manner 'likely to produce' death or great bodily injury [citation] requires more than a mere possibility that serious injury could have resulted from the way the object was used." (*B.M.*, *supra*, 6 Cal.5th at p. 534.) Appellant argues that his use of the knife, making a slashing motion, was not a sustained, violent attack, as in *B.M.* and *Brandon T.*

We are to review the record in the light most favorable to the judgment. (*Matthew A.*, *supra*, 165 Cal.App.4th at p. 540.) Doing so, we conclude that the juvenile court's finding is supported by substantial evidence.

Although Nochez testified that appellant did not try to stab him, Officers Sanchez and Estrada testified that Nochez told them appellant tried to stab him. The officers also testified that Nochez demonstrated the attempt by making a "forward slashing motion" or "upward motion." The juvenile court found the officers' testimony more credible than Nochez's. The court reasoned that Nochez "wanted to try to put the case in the best light he could" because he had learned appellant was a minor and wanted to help appellant's father. Credibility determinations are within the purview of the trier of fact. (*Koback*, *supra*, Cal.App.LEXIS 592 at p. *9.)

"Although it is inappropriate to consider how the object could have been used as opposed to how it was actually used, it is appropriate in the deadly weapon inquiry to consider what harm could have resulted from the way the object was actually used. Analysis of whether the defendant's manner of using the object was likely to produce death or great bodily injury necessarily calls for an assessment of potential harm in light of the evidence. As noted, a mere possibility of serious injury is not enough. But the evidence may show

that serious injury was likely, even if it did not come to pass." (*B.M.*, *supra*, 6 Cal.5th at p. 535.) Appellant used a "large kitchen knife" to make a slashing or upward motion toward Nochez, who backed up to avoid being struck by the knife. His manner of using the knife was likely to cause serious injury, even though it did not come to pass. The circumstances thus """""reasonably justify the [juvenile court's] findings, . . . [even if] the circumstances might also reasonably be reconciled with a contrary finding . . . .""""" [Citation.]" (*Koback*, *supra*, 2019 Cal.App.LEXIS 592, at pp. *8-*9.)

DISPOSITION

The order appealed from is affirmed.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.